

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

NO: 1:08-CR-01669-01 JB

RICHARD ANTHONY MCKENZIE,

Defendant.

TRANSCRIPT OF PROCEEDINGS

MOTIONS AND SENTENCING HEARING

September 7, 2012

BEFORE: HONORABLE JAMES O. BROWNING  
UNITED STATES DISTRICT JUDGE

Proceedings reported by stenotype.

Transcript produced by computer-aided transcription.

1 APPEARANCES

2 For the Plaintiff:

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6 505-346-7274  
7 BY: SAMUEL A. HURTADO, ESQ.  
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9 For the Defendant:

10 JAMES BAIAMONTE, ESQ.  
11 900 Lomas Blvd., NW,  
12 Albuquerque, NM 87102  
13 505-246-8166  
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15 The defendant appeared in person.

16 Also present:

17 Luis Zuniga, Probation Officer

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1 (In open court at 9:04 a.m.)

2 THE COURT: All right. Good morning,  
3 everyone. I appreciate everyone making themselves  
4 available to me this morning.

5 MR. HURTADO: Good morning, Your Honor.

6 THE COURT: The Court will call United  
7 States of America vs Richard Anthony McKenzie, Case  
8 Number 1:08-CR-01669-01 JB.

9 Counsel, may I have your appearances? For  
10 the government?

11 MR. HURTADO: Samuel Hurtado for the  
12 United States.

13 THE COURT: Mr. Hurtado, good morning to  
14 you.

15 MR. HURTADO: Good morning.

16 THE COURT: For the defendant?

17 MR. BAIAMONTE: Good morning, Your Honor.  
18 Jim Baiamonte, representing Mr. Richard McKenzie.  
19 My client appears personally before you today.

20 THE COURT: All right. Mr. Baiamonte,  
21 good morning to you.

22 Mr. McKenzie, good morning to you.

23 All right. We received -- I'm not sure I  
24 have a date that this was filed. But we received it  
25 by mail, and I gave instructions for it to be filed.

1           It's a motion to set aside the jury  
2     verdict against the defendant and to reconsider  
3     defendant's motion to compel production of witnesses  
4     and documents.

5           Have you received a copy of this? It  
6     looks like it was written and filed or sent to the  
7     Court by Mr. McKenzie.

8           Have you had a chance to see this  
9     document, Mr. Baiamonte?

10          MR. BAIAMONTE: No, sir. I did not get a  
11     copy from my client until this morning, about three  
12     minutes ago. I'm only on page 6 of 24. I have not  
13     had a chance to read it.

14          THE COURT: All right. Well, do you wish  
15     to say anything on this motion?

16          MR. BAIAMONTE: It appears that he's just  
17     relitigating the issues that have been litigated  
18     continually. So it would appear, one, that the  
19     issue is not timely filed. And secondly, it doesn't  
20     look like there's any new ground to cover on the  
21     motion.

22          But I have not had an opportunity to read  
23     the entirety of the motion.

24          THE COURT: All right. Mr. Hurtado, do  
25     you want the hearing or sentencing vacated so you

1 can respond to this? Are you ready to respond to it  
2 today orally, or how would you like to proceed?

3 MR. HURTADO: Yes, sir. If I may, I would  
4 like to respond to it orally at first.

5 THE COURT: Okay.

6 MR. HURTADO: And as I understand, Your  
7 Honor, I did notice that there was a motion filed  
8 this morning at about 8:51 a.m. I have not looked  
9 at that electronic pleading. I also showed it to  
10 Mr. Baiamonte. I just wanted to bring it to the  
11 Court's attention.

12 I don't know if the Court --

13 THE COURT: It may be this motion. I'm  
14 kind of open -- it got filed earlier. But it looks  
15 like this it's his motion.

16 Do you have a copy of this?

17 MR. HURTADO: I do not have a copy of the  
18 electronic motion. I do have a copy of the  
19 handwritten motion.

20 THE COURT: Okay, it's the same one. I'm  
21 looking at on the screen. So all we did was take  
22 the copy that Mr. McKenzie mailed to us, and I  
23 instructed the clerk's office to file it.

24 So you have it?

25 MR. HURTADO: Yes, sir. And with that

1 said, it does not appear that this was filed by  
2 Mr. Baiamonte himself.

3 And with that said, Your Honor, the United  
4 States would move to strike the defendant's motion  
5 because it was filed in his personal capacity. And  
6 consistent with the local rules, the United States  
7 would hereby request an order from the Court  
8 prohibiting any similar future filings.

9 The Court is aware that Mr. Baiamonte is  
10 the attorney appointed to represent Mr. McKenzie.  
11 Electronic filing in the District of New Mexico is  
12 mandatory under the Court's administrative order  
13 dated August 28th, 2006.

14 Under the CM-ECF Administrative Procedures  
15 Manual, Mr. McKenzie is not permitted to file  
16 pleadings electronically. The CM-ECF Administrative  
17 Procedures Manual, at 1 through 3, allows attorneys  
18 and pro se litigants who have obtained an order from  
19 court to file pleadings electronically.  
20 Mr. McKenzie is not permitted to file pleadings with  
21 the Court.

22 This motion is also untimely, as the  
23 motions deadline has passed prior to the current  
24 document being filed, and no relief was being sought  
25 by Mr. McKenzie for an extension.

1           Also, given the fact that all of the  
2     arguments that are contained in the motion, as  
3     Mr. Baiamonte pointed out, have been rehashed, and  
4     these matters have been litigated extensively before  
5     the Court.

6           And Your Honor, given the lateness of this  
7     filing, the United States would move to strike at  
8     this time. Thank you.

9           THE COURT: All right. Thank you,  
10    Mr. Hurtado.

11           Mr. McKenzie, I know that you've been --  
12    probably a lot of the things that Mr. Hurtado said  
13    are correct, and I agree with him. But I know  
14    you've been trying to preserve this issue.

15           Is there anything you'd like to say on  
16    this motion, so that you have it preserved for any  
17    appeal that you may take?

18           THE DEFENDANT: Yes, Your Honor.

19           THE COURT: And really, anything else you  
20    want to say in support of the motion, I'll allow you  
21    to do that.

22           THE DEFENDANT: Yes. The reason why I  
23    filed this motion is because --

24           MR. BAIAMONTE: Would you like --

25           THE COURT: It's up to you. If he wants

1 to stay seated, if you'll just pull that microphone  
2 up and talk into it, or if he wants to come up to  
3 the podium, whatever is best for you.

4 THE DEFENDANT: Good morning, Your Honor.

5 The issue at hand is that I when I  
6 first -- when I was first given Mr. Baiamonte as my  
7 attorney, one of the issues that I brought to him  
8 was that it's my understanding that perjury was  
9 committed and suborning perjury was committed, and  
10 that I believe Giglio violations and Brady material  
11 violations was committed.

12 At the time, I was researching it, and I  
13 couldn't fully explain it. But I understood that it  
14 was committed, and I asked my attorney to pursue  
15 this. And the comment that he made to me was that,  
16 why would he do this, when it would offend you,  
17 because it happened in your courtroom? So I felt as  
18 though I had no other choice but to submit a motion  
19 on my own.

20 Now he, my attorney, is stating that I'm  
21 rehashing old arguments, which I am not. The  
22 argument that I have now is related to Giglio  
23 violations, as far as Brady material violations, as  
24 well as perjury. And the only way that could have  
25 came out was by me going to trial.



1 I went to trial. And based on my  
2 constitutional right, I had the right to face my  
3 accuser. I believe that the prosecutor put a  
4 witness on the stand, knowing she was going to  
5 commit perjury.

6 And if I was going take the stand knowing  
7 I was going commit perjury, the United States -- I  
8 mean pardon me, the District Attorney would have  
9 sought an enhancement, as well as my attorney would  
10 have been in trouble.

11 So these are allegations that could be  
12 proven that my attorney does not want to seek out.  
13 That's why I was forced to submit my own motion.

14 THE COURT: All right .

15 THE DEFENDANT: And besides that, I'm  
16 going to -- I've worked with other cases that the  
17 prosecutor submitted perjury, along with the  
18 officer. I want to question him, and Daymon  
19 Martinez is not showing up.

20 This is the second time with this  
21 sentencing. I was trying to retain a private  
22 attorney, and I guess that fell through. I wasn't  
23 trying to stymie the Court or trying to delay it.

24 It's just that I felt as though the  
25 attorneys that you kept assigning to me wasn't

1 representing my constitutional rights to the best of  
2 my ability. They wasn't seeking any justice for me,  
3 so I was forced to submit my own motion. And it has  
4 continued to happen.

5 He hasn't read -- he hasn't read the  
6 motion. I sent a copy to his office. I sent a copy  
7 to the justice -- I mean to the judge, to the  
8 prosecutor, and to my attorney. He hasn't read it.

9 But yet he comes here and says that I'm  
10 rehashing old arguments, which I'm not. Giglio is  
11 not an old argument. Nor have I ever argued  
12 perjury, suborning perjury, or Brady violations. So  
13 for him to say that is basically what I've been --  
14 the frustration or the problem I've been going  
15 through since I've been down here in New Mexico for  
16 four years now.

17 I've had attorneys. For some reason, when  
18 I enter this courtroom, the constitution does not  
19 apply to me, and my attorney does not bring that  
20 out.

21 You've been the judge on my case for four  
22 years now. Like I said, my argument always has been  
23 that there is no informant on my case. There is  
24 no -- pardon me. There is no informant, that the  
25 United States committed perjury, and the prosecutor

1 suborned perjury. And I have proof of that without  
2 a doubt.

3 I have proven it. And my motion -- and  
4 that's why this motion that I submitted, I'm trying  
5 to seek relief from that. What I want to do is I  
6 want to argue perjury on my 1055. And the only way  
7 I can do that is by asking certain questions.

8 THE COURT: All right.

9 THE DEFENDANT: If I'm explaining it  
10 correctly.

11 THE COURT: All right.

12 Mr. Baiamonte, do you have anything  
13 further? What pages do you have? Do you want to  
14 take a moment to look at the rest of it?

15 I have my copy here, if you'd like to --

16 MR. BAIAMONTE: I would, Your Honor.

17 And of course, I would have read  
18 Mr. McKenzie's motion, had it found its way into my  
19 mailbox. I obviously didn't have time to look at  
20 the electronic version of it this morning. I was  
21 here.

22 Just regarding briefly, now that he's  
23 broached the subject of attorney/client  
24 conversations, he's waiving attorney/client  
25 privilege in that regard.

1           And just to inform the Court what the  
2     actual conversation was, Mr. McKenzie has been  
3     adamant from the beginning that not only DEA Agent  
4     Hyland should be prosecuted, but also Assistant US  
5     Attorney Daymon Martinez.

6           And when I asked him about the proof that  
7     he had for that, his answer was simple: That it was  
8     just so self-evident that anybody in the courtroom  
9     could have seen that happen. And I inquired of him  
10    if that would include Judge Browning. And he agreed  
11    that you should have seen it, and perhaps that you  
12    were in on the conspiracy as well.

13           At that point, I did point out that his  
14    position was ludicrous. So he's partially correct  
15    that we did have a conversation along those lines,  
16    but his memory is a little faulty on some of the  
17    finer points.

18           I think his issues regarding Agent Hyland  
19    and the PNR and all the other litigation is very,  
20    very well preserved in several motions and the trial  
21    and the objections, and they will be given all the  
22    attention they deserve on appeal. I don't know that  
23    the issue needs to be continually litigated at this  
24    level.

25           And if the 10th Circuit Court of Appeals

1 agrees with Mr. McKenzie, then the 10th Circuit  
2 Court of Appeals will do what they feel is  
3 appropriate.

4 But I do think it might be helpful if I  
5 could have a moment to review the entirety of  
6 Mr. McKenzie's pleading. The first 12 pages don't  
7 seem to indicate that there's any new ground to  
8 tread, but perhaps --

9 THE COURT: Do you have a copy? Ms. Wild  
10 has a copy. You can have my copy, whatever would be  
11 best for you.

12 MR. BAIAMONTE: Mine stops at page 18.

13 THE COURT: I'll let Ms. Wild hand you  
14 that copy.

15 MR. BAIAMONTE: Yes, sir.

16 THE COURT: While you're looking at that,  
17 let me go to Mr. Hurtado and see if he has any  
18 comments on what's been said so far on this motion.

19 Mr. Hurtado.

20 MR. HURTADO: Yes, Your Honor.

21 As an initial matter, the United States  
22 would deny any of the allegations that the defendant  
23 did set forth in his most recent filing with regard  
24 to perjury by either Special Agent Mark Hyland or  
25 Assistant US Attorney Daymon Martinez.

1           It's the government's position that those  
2     claims are absolutely meritless, and the only  
3     support for those contentions are that they are  
4     defendant's own self-serving statements.

5           And once again, the United States does  
6     stand by its initial motion to go ahead and strike  
7     the defendant's pleadings, since he's not authorized  
8     to do so, and proceed with sentencing in this  
9     matter. Thank you, sir.

10           THE COURT: All right. Thank you,  
11     Mr. Hurtado.

12           While Mr. Baiamonte is looking at the  
13     motion, Mr. McKenzie, if you have anything further  
14     you want to say on the motion?

15           THE DEFENDANT: Yes, Your Honor. I have  
16     four questions I want to pose to the Court, as well  
17     as Officer Hylander and Assistant Prosecutor Daymon  
18     Martinez.

19           One is that Officer Hylander stated that  
20     he enlarged the PNR report to take off the time.  
21     And the PNR report was faxed to him, showing two  
22     exhibits, showing the warrant that was from the day  
23     I was arrested and also the lab report that came  
24     back from Texas, along ...

25           If you want, I also have with me the

1 transcripts that they subpoenaed from T-Mobile. And  
2 T-Mobile sent back a reply, along with different  
3 phone numbers. And on the cover sheet, it has the  
4 DEA fax number on it. Case Agent Hylander said that  
5 he enlarged it to take off the numbers on top, which  
6 reveal who the informant was.

7 But the prosecutor apparently stated that  
8 he didn't want to be disingenuous to the Court. But  
9 there's a system identifier, and there's numbers  
10 within the PNR that suggest that the person who I  
11 dealt with -- Gabby Chester is the person who I dealt  
12 with.

13 So my question is: Why would the case  
14 agent enlarge the PNR report to take off numbers  
15 that's not relevant to who sent it, but leaves the  
16 system identifier numbers on the PNR report? That's  
17 one.

18 I never got the original copy. The only  
19 thing I received was a duplicate. Under  
20 Rule 18-101, I'm entitled to the original copy. I  
21 never got that.

22 Two, a sealed document was sent to you.  
23 The sealed document in question had four fax  
24 numbers. Agent Hylander stated that he only  
25 received one fax that day from the envelope.

1           My question is: How can the prosecutor  
2 still maintain that the informant sent the PNR  
3 report, when Agent Hylander said he got it from out  
4 of the envelope? And the PNR report which is in  
5 question has a system identifier number, which is  
6 Gabby Chester's, and it doesn't have anybody else's  
7 system identifier number on it.

8           Three, all he would have to do is give the  
9 original PNR -- the original form PNR in its  
10 entirety, and it would show -- the time on top would  
11 show or match one of the four faxes that relates to  
12 the sealed document that was sent to you. But I  
13 know for a fact that it was not, because date on it  
14 was 2007. I was arrested in 2008.

15           So not only did Agent Hylander lie or  
16 mislead the Court about the PNR being enlarged to  
17 take off the -- to reveal who the informant was,  
18 they also submitted the Court's own evidence, which  
19 is the PNR report, which is the sealed document with  
20 four faxes on it, but not related to when I was  
21 arrested. It was the year before when I was  
22 arrested.

23           You used that as part of your factual  
24 findings. Excuse me, I'm kind of nervous. But  
25 also, Agent Hylander said that he relied on the PNR



1 report to approach me that day.

2 If you look at the PNR report, it  
3 doesn't -- you can look at the PNR report from top  
4 to bottom, and it doesn't state the method of  
5 payment, who paid for it and how it was paid for.  
6 You have to have the unit element.

7 And that's my argument in my motion right  
8 now is that you have to have the human element. Who  
9 is an Amtrak employee or somebody who works for  
10 Amtrak to let you know how the method of payment  
11 was? Hylander could not have come up with that on  
12 his own.

13 But he said that he spoke to nobody  
14 before, during, and after he got the PNR report. So  
15 how does he make the determination that it was paid  
16 for by credit card or that Ruby Johnson paid for it  
17 by credit card, which it states on the warrant that  
18 it was paid for by a third party? You cannot look  
19 at the PNR report and determine how it was paid for.

20 And Amtrak -- and speaking of Amtrak, the  
21 only person who would know that is the person who I  
22 dealt with or if a representative of Amtrak was able  
23 to go into the system and look at it themselves.

24 There's no way in the world that somebody  
25 from the DEA office can look at the PNR report and

1 explain or elaborate or even suggest the method of  
2 payment. That's another thing. These are questions  
3 I want to pose to Officer Hylander, as well as the  
4 prosecutor.

5 Also, if Agent Hylander got the PNR report  
6 and not the envelope, Daymon Martinez -- excuse me.  
7 Prosecutor Daymon Martinez knew at the time -- or  
8 when did he ever ask to -- or did he ever speak to  
9 the informant?

10 So my thing is that when Agent Hylander  
11 got on the stand and the question was posed to him,  
12 "Did the informant send it," and he answered, "Yes,"  
13 Daymon Martinez knew that Agent Hylander was  
14 committing perjury. He allowed it to happen.

15 Those are issues I bring up in my motion  
16 that I sent to you.

17 THE COURT: All right. Thank you,  
18 Mr. McKenzie.

19 Have you had a chance now, Mr. Baiamonte,  
20 to review the entire motion that Mr. McKenzie filed  
21 this week?

22 MR. BAIAMONTE: Yes, sir. Thank you for  
23 that opportunity.

24 I have read it in its entirety. And I  
25 stand by my earlier assertion that there's nothing

1 new in there which would necessitate the Court  
2 vacating today's hearing or setting aside the jury  
3 verdict. Again, he has remedies available to him,  
4 and those will certainly be pursued.

5 THE COURT: All right. Thank you,  
6 Mr. Baiamonte.

7 Well, I did carefully review  
8 Mr. McKenzie's motion yesterday, in preparation for  
9 today's hearing. I took it home last night and also  
10 reviewed it. And I think it breaks down into a  
11 couple of categories.

12 One is the substance of the suppression  
13 motion. I don't think any of this goes to guilt or  
14 innocence in the trial phase, but it does go to  
15 Mr. McKenzie's concerns about what took place in the  
16 suppression hearing. And it didn't seem to raise  
17 new issues.

18 I understand Mr. McKenzie's concern that  
19 there were incorrect statements that were made at  
20 one or more of the hearings. I think we explored  
21 those in considerable detail, and I gave  
22 Mr. McKenzie quite a bit of latitude to establish  
23 that it never went, though, to the issue that the  
24 Court had to decide.

25 And that was whether Mr. McKenzie and

1 Mr. Hyland's confrontation there on the train and on  
2 the platform, whether that was consensual or not. I  
3 still think that it was consensual and that  
4 therefore, anything that occurred after that, the  
5 profiling issue is irrelevant because the consent  
6 broke any sort of concern about what took place  
7 before. And so I think any attack on that is  
8 misplaced.

9 And I know Mr. McKenzie disagrees with me,  
10 and that probably will be a subject of his appeal or  
11 any habeas attack under 2255. And I understand that  
12 we just had a disagreement on that.

13 But the reason I gave Mr. McKenzie a great  
14 deal of latitude to explore those issues earlier --  
15 I know it wasn't as much as he wanted, but I think  
16 everyone would agree it's probably more than most  
17 courts would have allowed -- was because I was  
18 concerned about the credibility of Mr. Hyland  
19 because he did make, I think, some mistakes. And  
20 the government made some representations that turned  
21 out not to be correct.

22 And so I wanted to explore those to make  
23 sure that those did not undermine the findings of  
24 fact that I made about Mr. Hyland. And I think I  
25 explored this. Some of the concerns that

1 Mr. McKenzie has had, I've shared.

2 But in the end, I don't think that, you  
3 know, how Mr. Hyland got the information and whether  
4 his memory was correct or whether he got it off a  
5 fax machine or someone else is terribly important.  
6 Because the bottom line is that however an officer  
7 gets up to a particular defendant, if the defendant  
8 consents to the search, as I think he did here, then  
9 it makes everything after that or what occurred  
10 before that somewhat irrelevant.

11 So I'm going to deny the motion to  
12 overturn the jury verdict against the defendant.  
13 I'm not going to reconsider the defendant's motion  
14 to compel production of witnesses and documents or  
15 the motion to suppress. I'll leave that in place.

16 We'll leave the motion -- I filed it for  
17 Mr. McKenzie, so it is part of the record. His  
18 additional comments, of course, will be part of the  
19 record. And I think that issue will have to remain  
20 for either appeal or a 2225 attack. All right.

21 Mr. McKenzie, have you reviewed the  
22 presentence report, as well as the memorandum dated  
23 September 30th, 2011, in this case? Have you  
24 reviewed those two documents?

25 THE DEFENDANT: Yes, sir. I have a

1 problem -- an issue with that, also.

2 THE COURT: All right. Let me hear from  
3 Mr. Baiamonte, because I know there have been  
4 objections raised. So it may be that those are the  
5 same ones that you're raising.

6 But Mr. Baiamonte, have you reviewed those  
7 two documents with Mr. McKenzie?

8 MR. BAIAMONTE: Yes, sir. That's been  
9 done not only by myself, but Mr. Bob Cooper did it  
10 as well.

11 And the Court will of course notice in the  
12 record that Mr. Cooper -- that would be attorney  
13 number three -- I'm sorry, attorney number two.  
14 Mr. Cooper filed a sentencing memorandum on,  
15 ironically, September 8th of last year. So one day  
16 shy of a year ago, Mr. Cooper was representing  
17 Mr. McKenzie.

18 Yes, the PSR has been reviewed in its  
19 entirety. And we have filed a sentencing memorandum  
20 objecting to some of the characterizations,  
21 particularly to Mr. McKenzie's criminal history.

22 And I won't belabor the point. But  
23 Mr. McKenzie's belief is that, as the driver -- the  
24 getaway car driver of the robbery, he should not be  
25 held to an armed robbery.

1           He would also point out that nobody was  
2     injured in the robbery. And these issues, I'm sure,  
3     were raised at trial, because it did go to trial.  
4     Nonetheless, Mr. McKenzie got convicted of the  
5     robbery.

6           And as to the drug charge which is  
7     plaguing Mr. McKenzie, he would also point out for  
8     the Court's edification that a very, very small  
9     amount of drugs were used. And as such a tiny  
10    amount, it should not be held against him. I  
11    believe it's .2 grams. And that's contained on  
12    paragraph 41, page 11.

13           And so the criminal history, in our  
14    estimation, does overrepresent his criminal history.  
15    And we're asking for a sentence, as I've said in my  
16    sentencing memorandum, of five years, which is the  
17    mandatory minimum.

18           THE COURT: All right. And are all the  
19    objections or issues that you have stated in the --  
20    I believe there's now three sentencing memorandums  
21    from Mr. McKenzie -- are they all stated in those?

22           MR. BAIAMONTE: Yes, sir, they are, in my  
23    sentencing memorandum on July 3rd of this year.

24           And one last loose end, sir, if I may.  
25    When we were here last, there was an issue about

1 Mr. Jason Bowles coming in to enter an appearance on  
2 behalf of Mr. McKenzie. I spoke personally with  
3 Mr. Bowles about two weeks ago, and it was his  
4 feeling at that time they were not intending to file  
5 an entry of appearance.

6 Last night, in preparation for today's  
7 hearing, I called Mr. Bowles' office and left a  
8 message around 4:00 in the afternoon, informing them  
9 that the sentencing was set to begin at 9:00 this  
10 morning. And if Mr. Bowles wished to be part of the  
11 case, he needed to do whatever it is he felt  
12 appropriate, and I was available to answer any  
13 questions. I received no phone call back from  
14 Mr. Bowles' office.

15 THE COURT: Yes. On that score, we  
16 received calls, I guess, from Mr. McKenzie's  
17 brother. It may have been yesterday. And Ms. Wild  
18 called and talked to Mr. Crow, and he indicated they  
19 would not be entering an appearance as well.

20 We received another call from I believe it  
21 was Mr. McKenzie's brother, but somebody on behalf  
22 of Mr. McKenzie this morning. But there's no  
23 indication that anyone else is coming into the case.

24 All right. So if all the objections and  
25 requests for downward departures and things are



1 contained in these documents, let's take those one  
2 at a time.

3 Let's start then with the objection that I  
4 think you began with, Mr. Baiamonte, on  
5 paragraph 41, which is this criminal sale of a  
6 controlled substance to a fellow in New York.

7 I believe, if I understand largely  
8 Mr. McKenzie's argument, he is challenging the  
9 amount of the drugs that were there at this stage.  
10 And if I'm misunderstanding his argument, please  
11 correct me.

12 But if there's anything else you wish to  
13 say on behalf of Mr. McKenzie as to the objection in  
14 paragraph 41 on page 11.

15 MR. BAIAMONTE: He is wishing the Court to  
16 know that there's no indictment on this charge. But  
17 I would note that he did plead guilty.

18 THE DEFENDANT: If it please the Court,  
19 may I get my own paperwork?

20 THE COURT: If Mr. Baiamonte is finished,  
21 then I'll allow you to speak as well.

22 MR. BAIAMONTE: That's all I have, Your  
23 Honor. The argument was that it was a very small  
24 amount.

25 And I would also note that the age of the

1 offense, it's rolling up on 20 years. So it's our  
2 estimation or our hope that the Court will agree  
3 with us that Mr. McKenzie is a different man than he  
4 was in 1994.

5 THE COURT: All right. Did you have  
6 something you wanted to say on this, Mr. McKenzie?

7 THE DEFENDANT: Yes, Your Honor.

8 This is another issue that I had with my  
9 attorney, Mr. Cooper, and also my present attorney  
10 is that I see that the presentence report was done  
11 by a Mr. Zuniga.

12 And when he did it, he had -- the robbery  
13 charge in question, he has my indictment. He has a  
14 police report. He also has a judge's -- I mean the  
15 officer's report, the indictment and the verdict.  
16 And also, the indictment was a true bill.

17 But when it comes to my own '94 case, I  
18 understand ignorance is no excuse of the law. But  
19 from me doing research on my own and also seeing  
20 what the probation officer provided, I believe that  
21 I entered a plea to -- I can't explain. There's no  
22 indictment on this case, there's no police report.  
23 I can't find nothing that resembles any type of  
24 charge.

25 But what the probation -- excuse me. But

1 what's in the report by the probation officer in New  
2 Mexico is basically what's reflected by the  
3 probation -- by the PSR person in New York, where I  
4 pled guilty to this offense there.

5 There's no indictment. The police never  
6 submitted a report. I don't know the quantity of  
7 drugs. I remember offhand it was cocaine that I did  
8 sell. I will admit to that.

9 But I believe that I entered into a plea  
10 agreement that was illegal. And it reflects this,  
11 that there's nothing here but summaries of legal  
12 history or just information based on a presentence  
13 report, and nothing else.

14 To my memory, I don't remember, even when  
15 I went to the plea agreement, that my attorney was  
16 even present.

17 THE COURT: All right. Mr. Zuniga, you  
18 had mentioned in the PSR, "according to the  
19 indictment." Do you have a copy of the indictment?

20 PROBATION OFFICER ZUNIGA: Your Honor, I  
21 do have a copy. We have a copy of the presentence  
22 report.

23 THE COURT: Do you want to show  
24 Mr. McKenzie that indictment? We might have that  
25 attached to the clerk's minutes here or a copy of

1 it.

2 THE DEFENDANT: This is not an indictment.  
3 This is just the presentence report. Basically, he  
4 had the information of what would he do, what he did  
5 with me. He has the information from the  
6 presentence report that was done on me in Troy, New  
7 York, in '94.

8 He doesn't have the indictment. He  
9 doesn't have -- I don't know what I was indicted  
10 for, the quantity, the amount I was indicted for.  
11 There's no police report. It was never filed.  
12 There's no officer. I don't have an officer in my  
13 case.

14 That's the same thing my family was trying  
15 to inquire, and they couldn't find that, either.  
16 And like I said, ignorance is no excuse for the law.  
17 I pled guilty to it. But now, in hindsight, I  
18 believe I was railroaded. I went to my sentencing.  
19 I remember that the attorney wasn't even present.

20 I asked for the particulars at the time,  
21 because I did understand that. I didn't get a bill  
22 of particulars. So I believe I entered into a plea  
23 agreement. But I can't explain it because there's  
24 no record to show that I was legally indicted or  
25 what was I charged for, besides what the probation

1 officer is saying.

2 THE COURT: Mr. Hurtado, any thoughts on  
3 paragraph 41?

4 MR. HURTADO: Yes, Your Honor.

5 Very briefly, Your Honor, as to the age of  
6 the offense, I know that's an issue that  
7 Mr. Baiamonte just raised with the Court, indicating  
8 that this occurred almost 20 years ago. However,  
9 the government would maintain that that wouldn't  
10 necessarily invalidate the offense.

11 He stands before the Court convicted on  
12 yet another drug trafficking offense. And in the  
13 way of interest to the government, that's a pattern  
14 of escalating criminal activity that shows no signs  
15 of abatement or even of respect for the law. So I  
16 don't necessarily agree that just because the charge  
17 is almost 20 years ago would necessarily invalidate  
18 it.

19 As far as the information contained in  
20 paragraph 41, the information shows that the  
21 defendant was in fact represented by counsel. And  
22 just because the defendant may not agree with the  
23 amount of cocaine sold doesn't necessarily  
24 invalidate the conviction, either. He did plead  
25 guilty, and he was represented by counsel. And on

1 its face, it appears that it is a valid conviction.

2 And for those reasons, the United States  
3 would ask the Court to sustain -- excuse me, deny  
4 the defense's objection with regard to paragraph 41.  
5 Thank you.

6 THE COURT: All right. Thank you,  
7 Mr. Hurtado.

8 Is there anything else you want to put  
9 into the record to support either the indictment or  
10 any other material you have, Mr. Zuniga?

11 PROBATION OFFICER ZUNIGA: No, Your Honor.

12 THE COURT: We'll mark as Exhibit A the  
13 presentence report. Is that what that is,  
14 Mr. Baiamonte?

15 MR. BAIAMONTE: It is the 1994 documents  
16 from New York.

17 THE COURT: Okay. We'll look at those,  
18 and we'll mark those as Exhibit A, if there's no  
19 objections to attaching those.

20 MR. BAIAMONTE: No objection from the  
21 defense, Your Honor.

22 MR. HURTADO: No objection from the  
23 government, Your Honor.

24 (Exhibit A was admitted.)

25 THE COURT: So if I understand your

1 argument, you're not saying you weren't convicted?  
2 You're just arguing that you were kind of railroaded  
3 into, I guess, pleading to something that you don't  
4 know what you really pled to. Is that the guts of  
5 what you're saying?

6 THE DEFENDANT: Yes. I'm basically saying  
7 that I could ask you, as a judge, to look at the  
8 elements of my past crimes. And how can I get you  
9 to actually look at it if there's no elements?  
10 Besides me pleading guilty, there's no entry of a  
11 crime being committed. There's no indictment,  
12 there's no police report.

13 And I know ignorance is no excuse for the  
14 law. But I believe the way I was sentenced, it's  
15 unconstitutional. There's no fingerprints of what  
16 happened. If I was to ask you to look at the  
17 elements of the crime in order to determine the  
18 quantity of drugs or the role I played in it,  
19 there's nowhere I could get it. And how would you  
20 get it? So I feel that it's doing me a disservice.

21 THE COURT: All right. Mr. Zuniga?

22 PROBATION OFFICER ZUNIGA: Your Honor, on  
23 August 22nd of 2008, at that time we received a  
24 collateral response from the Northern District of  
25 New York or yes, the Probation Office. And

1 according to Kelly Martin, who was a probation  
2 officer at that time, that's where we got our  
3 information from as far as the way she said the  
4 individual was sentenced and what he pled guilty to.

5 Here she indicated -- on this one, there's  
6 no reference to an indictment. But there is a  
7 response as far as what he pled guilty to and what  
8 he was sentenced to.

9 THE COURT: All right. Why don't you show  
10 that to Mr. McKenzie?

11 And any objection to making that Exhibit B  
12 to the clerk's minutes?

13 MR. HURTADO: No objection from the  
14 government.

15 THE COURT: Mr. Baiamonte --

16 PROBATION OFFICER ZUNIGA: That's from the  
17 probation officer in New York, where we got a  
18 collateral response.

19 THE COURT: -- any objection?

20 MR. BAIAMONTE: No, sir. No objection.

21 (Exhibit B was admitted.)

22 THE COURT: Anything further,  
23 Mr. McKenzie?

24 THE DEFENDANT: Yes. Also, if you look at  
25 41, the date on this is 5/13/94, criminal sale of a



1 controlled substance. And then if you go down to --  
2 let me take you to the first one above that, which  
3 is unlawful possession of marijuana, which is dated  
4 5/5/1994, unlawful possession of marijuana.

5 Then if you go down, it says, "attorney  
6 presentation was not confirmed," which I know is  
7 important in every stage of proceedings.

8 Then if you go to the last sentence, it  
9 says, "Offense report was requested. However, the  
10 report was unable to be located."

11 Then you go down to 41, 5/13/1994, which  
12 is criminal sale of a controlled substance. Then if  
13 you go down, it says, "Defendant was represented by  
14 counsel." All right?

15 According to the indictment, on or about  
16 May 5th, May 5th is the marijuana charge, the  
17 unlawful possession of marijuana. It doesn't make  
18 any sense if the criminal sale happened on  
19 5/13/1994, and in the report he's attributing my  
20 indictment to May 5th.

21 Then if you go down to the bottom, it  
22 says, "Offense report was requested. However, the  
23 report was unable to be located."

24 But yet I had a counselor, the exact same  
25 wording, except the difference is that now, on the

1 13th one, I had -- mysteriously, I was represented  
2 by counsel. It is the exact same language, but two  
3 different dates.

4 MR. BAIAMONTE: Except for the  
5 marijuana/cocaine distinction.

6 THE DEFENDANT: He's saying that the  
7 criminal sale of a controlled substance, I was  
8 indicted on May 5th. But I was also indicted on  
9 May 5th for possession of marijuana, right?

10 THE COURT: Well, they look like they're  
11 just different charges.

12 THE DEFENDANT: Exactly, they're different  
13 charges. But I'm being attributed and being  
14 indicted for the criminal sale on the indictment of  
15 the marijuana, which is a misdemeanor that I served  
16 15 days for.

17 THE COURT: And you're not receiving any  
18 points for that.

19 THE DEFENDANT: What I'm trying to say is  
20 that you're attributing an indictment of May 13,  
21 1994, as a controlled substance charge. But when  
22 you go down into the paragraph, it says, according  
23 to the indictment on May 5th, for 41, the date is  
24 from May 13th, which is when I was arrested for the  
25 controlled substance charge.

1 THE COURT: All right. Mr. Zuniga,  
2 anything further?

3 PROBATION OFFICER ZUNIGA: Yes, Your  
4 Honor. We have some more reports here. We can  
5 indicate -- as far as where we got those dates from,  
6 I can show it to Mr. McKenzie.

7 THE COURT: All right. Why don't you show  
8 that to him?

9 Any objections to these being attached as  
10 Exhibit C to the clerk's minutes?

11 MR. HURTADO: No, Your Honor.

12 THE COURT: Any objection, Mr. Baiamonte?

13 PROBATION OFFICER ZUNIGA: It says  
14 "controlled substance" here. Whether it be, Your  
15 Honor, an error on our part, maybe the May 5th --  
16 maybe that last sentence should probably have been  
17 applied to the indictment.

18 THE COURT: Well, just take out the  
19 indictment portion, and take out, " according to the  
20 indictment on or about May 5th, 1994."

21 PROBATION OFFICER ZUNIGA: Yes, Your  
22 Honor.

23 THE COURT: Any objection to that,  
24 Mr. Baiamonte?

25 MR. BAIAMONTE: No, sir.

1 THE COURT: Any objection, Mr. Hurtado?

2 MR. HURTADO: No, sir.

3 (Exhibit C was admitted.)

4 THE COURT: All right. Well, one of the  
5 things -- and this will apply to probably what we're  
6 going to hear as arguments on 42 as well. Remember,  
7 the framework that we start with is in Custis, the  
8 Supreme Court, and I'm bound by the Supreme Court.

9 They made a distinction between collateral  
10 attacks based on the complete denial of counsel and  
11 then collateral attacks based on other  
12 constitutional claims. And that applies to  
13 sentencings, some of the guidelines, and under the  
14 ACCA. So we're bound by that structure.

15 Therefore, when you apply Custis, with the  
16 exception of collateral attacks based upon complete  
17 denial of counsel, and I don't think that's what  
18 we're dealing with in paragraph 42, the District  
19 Court sentencing a defendant under the career  
20 offender provisions of the guidelines cannot  
21 consider a collateral attack on a prior conviction.

22 And if the defendant doesn't allege a  
23 complete denial of counsel in the state proceedings,  
24 then the sentencing district judge can refuse to  
25 consider any constitutional challenges to that. I

1 base that distinction on United States vs Garcia, a  
2 10th Circuit case. That's at 42 F.3d. 573.

3 Custis, of course, is a Supreme Court case  
4 at 511 US 485, decided in 1994, where they, in that  
5 case, basically said they're not going to consider  
6 an ineffective assistance claim in state proceedings  
7 at the sentencing stage.

8 I have issued an opinion, which I reviewed  
9 last night, in preparation for today. It's called  
10 United States vs Jim. It's at 2012 Westlaw 2574807,  
11 in which it talks about challenges to prior  
12 convictions of sentences. So they really can't be  
13 collaterally attacked, except on this complete  
14 denial of counsel.

15 And I also issued an opinion in United  
16 States vs Justice, at 2011 WL 5223032, which deals  
17 with what has to be shown by the defendant, and that  
18 is the challenge. And that hasn't been the  
19 challenge that's been brought here.

20 So I will overrule the challenge to  
21 paragraph 41 and continue to consider it.

22 I will take into consideration, which I  
23 think is what Mr. Baiamonte said, that given the age  
24 of it, the circumstances of it, those sort of things  
25 that are the kind of things that I think

1 Mr. McKenzie was arguing, are more important for the  
2 variance challenge. And I'll certainly consider  
3 those and hear those later.

4 But I do think, at least as far as for  
5 criminal history, I think that the challenge should  
6 be overruled.

7 All right, let's go to paragraph 42. Your  
8 challenge to paragraph 42, Mr. Baiamonte.

9 MR. BAIAMONTE: Other than what I've  
10 previously said, Your Honor, and what's filed in my  
11 sentencing memorandum, that's all I have on that  
12 issue.

13 THE COURT: All right.

14 Mr. Hurtado, anything further on that?

15 MR. HURTADO: No, sir.

16 THE COURT: Well, I think largely for the  
17 same reasons, that one should be overruled.

18 All right, let's talk about the acceptance  
19 of responsibility. I think this is an argument  
20 Mr. Cooper made.

21 Anything further you want to say on that,  
22 Mr. Baiamonte?

23 MR. BAIAMONTE: I filed that issue, along  
24 with several of the other issues, under Anders vs  
25 California, Your Honor. I don't think it's

1 applicable in this case. But my client wished it  
2 raised, and I raised it.

3 THE COURT: All right.

4 Anything further on that, Mr. Hurtado?

5 MR. HURTADO: Just briefly, Your Honor.

6 The United States would stand by its  
7 position, as set forth in the government's  
8 sentencing memorandum, that basically reduction for  
9 acceptance of responsibility is not appropriate in  
10 the facts of this particular case simply because the  
11 defendant did put the United States to its burden of  
12 proof at trial by denying all the essential elements  
13 of guilt and, quite frankly, continues to do so.

14 So pursuant to United States Sentencing  
15 Guidelines, Section 3E1.1, it's the government's  
16 position that the defendant would be ineligible for  
17 a reduction based on acceptance of responsibility.  
18 And he has also never submitted a statement  
19 admitting his responsibility for any of the  
20 offenses. Thank you.

21 THE COURT: All right. Thank you,  
22 Mr. Hurtado.

23 Let me ask Mr. Baiamonte if he has  
24 anything else.

25 MR. BAIAMONTE: No, sir.

1 THE COURT: Okay. Mr. McKenzie?

2 THE DEFENDANT: Yes, Your Honor.

3 I would disagree. I never one time, and  
4 the attorneys that I've had, I never instructed them  
5 to ever say that or I didn't have possession or that  
6 I didn't have cocaine. My issues always have been  
7 constitutional.

8 And if I can read into the record, under  
9 3E1.1, Acceptance of Responsibility, paragraph 2,  
10 "In rare situations, the defendant may clearly  
11 demonstrate an acceptance of responsibility for his  
12 criminal conduct even though he exercises his  
13 constitutional right to a trial. This may occur,  
14 for example, where a defendant goes to trial to  
15 assert and preserve issues that do not relate to  
16 factual guilt to challenge the applicability of a  
17 statute or to challenge to accept ability of a  
18 statute to his conduct. In each such instance,  
19 however, a determination that a defendant has  
20 accepted responsibility will be based primarily upon  
21 pretrial statements and conduct."

22 You have sat in on all my hearings, read  
23 all my motions that were submitted by my attorneys.  
24 And never one time did I ever say I was guilty or  
25 innocent of said charges. My issues always have



1    been constitutional issues, and they will remain a  
2    constitutional issue. How they got the PNR report  
3    and what they did after that. That's it.

4                   THE COURT: All right.

5                   Well, I've certainly considered this  
6    because Mr. McKenzie's focus has been on this motion  
7    to suppress. That has been the focus that he's had  
8    throughout these proceedings.

9                   But if you continue to read the part of  
10   the guidelines that Mr. McKenzie was referencing,  
11   which I do think are the controlling portions here,  
12   it does say, "In each such instance, however, a  
13   determination that a defendant has accepted  
14   responsibility will be based primarily upon the  
15   pretrial statements and conduct."

16                  While I think his focus has been on the  
17   motion to suppress, I'm not sure that I really have  
18   seen, even through today, that he's accepted  
19   responsibility for the criminal conduct. And in  
20   fact, there have been considerable actions that  
21   indicate that he's resisted accepting  
22   responsibility. And that may well be in his  
23   interest, of course, trying to preserve that for  
24   appeal.

25                  But I do think that he has not indicated

1 that he accepts responsibility for the criminal  
2 conduct here. And simply because his focus has been  
3 on the motion to suppress doesn't mean that that  
4 constitutes acceptance of responsibility.

5 I've outlined some of the factors here.  
6 And it's not identical, but it does have some  
7 similar factual characteristics to this case. In a  
8 case called United States vs Manzanares-Sanabria,  
9 it's actually an unpublished opinion at  
10 814 F.Supp. 2d at 1155, and I will refer  
11 particularly to pages 1163 through -- and I wrote  
12 here kind of extensively on it -- through 1167 --  
13 I'll make sure -- I got through 1168 -- in which I  
14 talked about the court's need to look at the  
15 pretrial conduct.

16 And I think it establishes why I think, in  
17 this case, there was no acceptance of  
18 responsibility. It must be clearly done. And it  
19 can be even denied, of course, when people go to  
20 trial, as Mr. McKenzie pointed out.

21 But I think in a case like this, even  
22 though there's a focus on the motion to suppress, I  
23 do think that he resisted both at trial and pretrial  
24 that he was legally liable for the criminal conduct  
25 for which he was charged.

1           So I'll overrule that objection and not  
2     give the points for acceptance of responsibility.

3           All right. Then, Mr. Baiamonte, I think  
4     you also made a Kimbrough argument against the  
5     enhancement. If you wish to argue in support of  
6     that objection.

7           MR. BAIAMONTE: Well, I think all the  
8     issues, everything I was going inform the Court of,  
9     have been brought to the Court's attention on all  
10    the cumulative arguments that we've been making  
11    throughout this morning, and I have nothing further  
12    to add to the comments. That would be repetitious  
13    and unnecessary. But I rest on my pleadings and  
14    prior comments.

15          THE COURT: All right. Anything else then  
16    that you wish to say on behalf of Mr. McKenzie  
17    before sentence is imposed?

18          MR. BAIAMONTE: We would ask the Court to  
19    make a recommendation to the Bureau of Prisons for a  
20    place of incarceration in New York. My client has  
21    substantial family up in that area.

22          And there's a valid reason to make that  
23    request of the Bureau of Prisons, mindful of the  
24    fact that it's simply that. It's a hoped-for  
25    request that the Bureau of Prisons would honor,

1 because it's our understanding that it's a  
2 recommendation by the Court that is taken very  
3 seriously by those folks.

4 THE COURT: All right. Do you have any  
5 specific place up there? Is there a particular  
6 region of New York, or is it New York City?

7 MR. BAIAMONTE: It's Upstate New York.  
8 And forgive me, Your Honor. There's a place up  
9 there that was the site of the 1980 Winter Olympics  
10 at Lake Placid. They don't call it that anymore, of  
11 course, but that's been turned into an FCI.

12 I could supplement to the Court, if you  
13 wish me to, the exact name. He's also informed me  
14 that New Jersey is very acceptable to him.

15 THE COURT: All right. Mr. Zuniga, why  
16 don't you take a look at that? You don't have to  
17 answer right at the moment. But see if there's a  
18 place in Upstate New York and New Jersey.

19 And we'll come back to this issue before  
20 we're done today and see if there's an appropriate  
21 facility for Mr. McKenzie. And we can discuss  
22 whether he has a preference on that.

23 Mr. McKenzie, you have an opportunity to  
24 speak on your own behalf before sentence is imposed.  
25 What would you like to say to the Court, and what

1 would you like the Court to consider before I impose  
2 sentence this morning?

3 THE DEFENDANT: I have one more objection  
4 about the sentencing memorandum prepared by  
5 Mr. Zuniga, dealing with his analysis on the  
6 robbery. What I have right now is a State of New  
7 York Public Corrections Service Temporary Release  
8 Notice.

9 The way in which he wrote it into his  
10 sentencing memorandum was that it was coming from  
11 the opinion of a counselor. What I have is the  
12 paperwork, which is, "A review of inmate's current  
13 conviction indicates that he does not fall into the  
14 specific language of Executive Order 521, which was  
15 enacted by Professor Tachie (sic).

16 And what it is is that he issued an  
17 executive order which allowed a commission to look  
18 at the elements of my crime or robberies and  
19 determine whether, because no violence was displayed  
20 and because of my minor role, I fit the criteria,  
21 which my attorney felt in the beginning which I  
22 should have been charged with, facilitating a lesser  
23 charge, which was never given to me in my trial.

24 So the language in 5.1, which I felt and  
25 which was in an executive order by the government,

1 basically said that because of my role or because  
2 the victim never identified me, the witnesses to the  
3 crime never identified me, and the fact that it was  
4 the theory of the crime where it went from me being  
5 a person of custody to this individual to now where  
6 I was the driver of the car, the language in that  
7 executive order fitted me to where I shouldn't have  
8 been charged with the robbery.

9 And that is why I was eligible to be  
10 considered for temporary release consideration,  
11 instead of the reverse, where he contacted the  
12 facility which I was released from. And the  
13 counselor has explained to him that they considered  
14 me -- you know, I was considered by their own  
15 executive order.

16 And I know that you can look at the  
17 elements of my past history, as far as the robbery  
18 goes.

19 THE COURT: Yes. And that's what I --

20 THE DEFENDANT: And that was then  
21 submitted by me and my attorney.

22 THE COURT: Yes. It's that ineffective  
23 assistance claim, basically on that, that I really  
24 am not free to consider on the objection to the  
25 criminal history. But I can certainly consider that

1 as part of your request for a variance.

2 THE DEFENDANT: The only reason I bring it  
3 up is because maybe I was misinterpreting the  
4 Fanfan. My attorney was sitting next to me, and we  
5 had some cases, like Anderson. But when I was  
6 reading Fanfan and Booker on the statements of fact  
7 on the Sixth Amendment, you can look at past  
8 elements of my past crimes to determine where my  
9 sentencing falls at.

10 And I was charged with robbery. And if  
11 you look at it, it's a harsh crime. But if you  
12 cross-reference it to the federal guidelines, it's  
13 one that doesn't cause bodily harm.

14 And like I said, the victim in that crime  
15 didn't -- didn't -- money wasn't even taken, it was  
16 receipts. And again, I state that ignorance is no  
17 excuse of the law. But I believe my attorneys  
18 failed me in that case also.

19 I should be been charged with a lesser  
20 included charge. And like I said, the theory of my  
21 indictment changed once I went to trial. I guess  
22 once the prosecutor seen that the witness, along  
23 with the victim, wasn't going to identify me, and in  
24 fact, the victim wasn't hurt, they still allowed me  
25 to be prosecuted for robbery.

1           But then I guess once I went to prison,  
2   under this Executive Order 5.1 to review my case,  
3   and seeing that the statute didn't hold, that's why  
4   they dropped it and made me eligible -- well, not  
5   dropped it as far as the crime itself, but they  
6   dropped it as far as recommending me for work  
7   release.

8           Because if you have a violent crime, you  
9   can't get work release. And I was eligible to be  
10  recommended for work release, based on an executive  
11  order, and I just wanted to read that into the  
12  record.

13           THE COURT: All right. Thank you,  
14  Mr. McKenzie.

15           Mr. Hurtado, any remarks on behalf of the  
16  United States before sentence is imposed?

17           MR. HURTADO: Only that the United States  
18  would stand by its recommended sentence of 327  
19  months, as set forth in the sentencing memorandum,  
20  given that the defendant is in fact a career  
21  criminal.

22           And given the facts and circumstances of  
23  this particular case, the United States believes  
24  that the sentence is appropriate in this case.  
25  Thank you, Your Honor.



1                   THE COURT: All right. Thank you,  
2 Mr. Hurtado.

3                   All right. I will now state the sentence,  
4 but the attorneys will have a final chance to make  
5 legal objections before the sentence is actually  
6 imposed.

7                   The Court has, I think this record will  
8 reflect, carefully reviewed the presentence report  
9 factual findings, and I think I've addressed all the  
10 objections to them.

11                  We've made one change to paragraph 41 to  
12 reflect the correct information about the  
13 indictment. But other than those, the Court will  
14 adopt the presentence report factual findings as its  
15 own.

16                  The Court has also considered the  
17 sentencing guideline applications in the presentence  
18 report. There not being any objections that the  
19 Court has not dealt with, the Court will adopt those  
20 as its own as well.

21                  The Court has also considered the factors  
22 set forth in 18 USC, Section 3553(a)(1) through (7),  
23 including the finding that the defendant is a career  
24 offender. The offense level is 34, and the criminal  
25 history category is 6, the guideline imprisonment

1 range is 262 to 327 months.

2 The Court notes that on June 7th, 2008,  
3 the defendant unlawfully, knowingly, and  
4 intentionally distributed a total of 2.984 kilograms  
5 of cocaine.

6 The Court has, as I think the record of  
7 these proceedings reflects, carefully considered the  
8 guidelines, but in arriving at the sentence, has  
9 taken into account not only the guidelines, but  
10 other sentencing goals. Specifically, the Court has  
11 considered the guideline sentencing range  
12 established for the appropriate category of offense  
13 committed by the applicable category of the  
14 defendant.

15 And, of course, the parties have really  
16 gone to the far ends on this. And the defendant has  
17 asked for 60 months, which would be a substantial  
18 variance. And the government has asked for  
19 something at the high end of the guideline range.

20 Taking first Mr. McKenzie's request for a  
21 downward departure, the Court doesn't have any  
22 substantial disagreement, in a Kimbrough sense, with  
23 the career offender enhancement. It is a  
24 substantial enhancement. But I think that these are  
25 pretty typical in the federal system and in the

1 state systems.

2 There has been criticism of the amount,  
3 maybe the way the Guideline Commission did it. But  
4 the 10th Circuit has, in a few opinions, been  
5 unimpressed on those from a Kimbrough standpoint.  
6 The Court doesn't have any substantial disagreement  
7 with the Commission's guideline range.

8 The Court has also considered the  
9 arguments that Mr. McKenzie has made over the course  
10 of the case. And I fear that if I start varying  
11 from the guidelines, I'll begin to undercut and give  
12 him reductions for acceptance of responsibility, in  
13 effect given that there has not been one in this  
14 case. And to start varying I think would begin to,  
15 in effect, give him some reduction.

16 I carefully reviewed the presentence  
17 report, his history, his family history. I didn't  
18 see anything so extraordinary that called for a  
19 variance from it because of his particular history.  
20 While obviously, there's some things that's occurred  
21 to him that are unfortunate and sad, I don't see the  
22 sort of unique circumstances in his history, social  
23 history, that calls for a variance.

24 And so I think that after carefully  
25 considering his circumstances, I believe the

1 punishment as set forth in the guidelines is  
2 appropriate for this sort of offense.

3 I then have considered the kinds of  
4 sentencing range established by the guidelines. And  
5 I don't see any reason, largely for the same  
6 reasons, to go further up in the guidelines.

7 It's high enough, and I don't see any  
8 reason to go at the high end of the range. These  
9 are high sentences that the Commission has  
10 promulgated, and I don't think that there's a need  
11 in Mr. McKenzie's situation to go at the high end of  
12 the range.

13 So I think something at the low end of the  
14 range of 262 months is adequate to reflect the  
15 seriousness of the offense. I think it promotes  
16 respect for the law. I think it provides just  
17 punishment. I think it affords adequate deterrent  
18 both at the specific and the general level. It  
19 protects the public.

20 And because it remains a guideline  
21 sentence, and I usually, unless there's some  
22 compelling reason, don't go into the higher portions  
23 of the range, I think this avoids unwarranted  
24 sentencing disparity for defendants of similar  
25 record who have been found guilty of similar

1     conduct.

2                   And because of some things I'm going to  
3     require as part of supervised release, I think it  
4     provides the defendant with some needed education  
5     and training and care to overcome some of the  
6     problems he's had in life.

7                   In sum, I think this sentence fully and  
8     effectively reflects each of the factors embodied in  
9     18 USC, Section 3553(a). I think this sentence  
10    is -- given the guidelines, I think it's reasonable.  
11    And this sentence is sufficient, without being  
12    greater than is necessary, to comply with the  
13    purposes of punishment set forth in the Sentencing  
14    Reform Act.

15                  Therefore, as to  
16    Indictment 1:08-CR-01669-01 JB, the defendant,  
17    Richard Anthony McKenzie, is committed to the  
18    custody of the Bureau of Prisons for a term of 262  
19    months. The defendant is placed on supervised  
20    release for a term of four years. The defendant  
21    must comply with the standard conditions of  
22    supervised release and the following mandatory  
23    conditions.

24                  The defendant will submit to DNA  
25    collection and compliance with statutory

1 requirements while incarcerated in the Bureau of  
2 Prisons, under the direction of the United States  
3 Probation Office.

4 The defendant shall not possess, have  
5 under his control or have access to any firearm,  
6 ammunition, explosive device or other dangerous  
7 weapons, as defined by federal, state or local law.

8 The following special conditions will also  
9 be imposed. I'm going to rewrite this one slightly.  
10 I'm not going to impose any sort of residential  
11 placement, so I'm going to delete that.

12 The defendant must participate in and  
13 successfully complete a substance abuse treatment  
14 program, which may include drug testing or  
15 outpatient counseling, and I'll just eliminate  
16 residential placement.

17 The defendant is prohibited from  
18 obstructing or attempting to obstruct or tamper in  
19 any fashion with the collection, efficiency and  
20 accuracy of any substance testing device or  
21 procedure. The defendant may be required to pay a  
22 portion of the cost of treatment and/or drug  
23 testing, as determined by the Probation Office.

24 The defendant must refrain from the use  
25 and possession of alcohol and other forms of

1     intoxicants. He must not frequent places where  
2     alcohol is the primary item for sale.

3             The defendant must submit to a search of  
4     his person, property or automobile under his  
5     control, to be conducted in a reasonable manner and  
6     at a reasonable time, for the purpose of detecting  
7     illegal substances, weapons and contraband, at the  
8     direction of the probation officer. He must inform  
9     any residents that the premises may be subject to a  
10    search.

11            And I'm also going to require some mental  
12    health treatment program, but I'm not going do it on  
13    a residential placement basis. So I'll rewrite this  
14    one to say, "The defendant must participate in and  
15    successfully complete a mental health treatment  
16    program, as approved by the probation officer, which  
17    may include outpatient counseling or prescribed  
18    medication," period.

19            So we'll eliminate any reference to  
20    residential placement and remove that clause about  
21    approval up behind the program.

22            I don't like medication because I think  
23    the people in the mental health program ought to be  
24    the ones taking the lead on that.

25            The defendant may be required to pay a

1 portion of the cost of this treatment, as determined  
2 by the Probation Office.

3 The first condition as to the substance  
4 abuse treatment, I'm going to impose that obviously  
5 because of the nature of this crime.

6 As far as special condition number two,  
7 which goes to the -- number three, which goes to the  
8 mental health counseling -- actually it was number  
9 four, I'm going to impose that to assist the  
10 defendant in the reintegration after serving his  
11 sentence, which is lengthy.

12 And the one as to the illegal substances,  
13 alcohol, those are imposed to assure that he  
14 complies with the mandatory condition that he not  
15 possess or use any illegal substances. So I think  
16 these other ones help him avoid any possession of  
17 illegal substances, which has been a problem in his  
18 life.

19 Based on the defendant's lack of financial  
20 resources, the Court will not impose a fine. The  
21 defendant will pay a special assessment of \$100,  
22 which is due immediately.

23 Let me see if Mr. Zuniga -- do you have  
24 some thoughts on what would be an appropriate  
25 facility in either Upstate New York or New Jersey



1 for Mr. Zuniga (sic)?

2 PROBATION OFFICER ZUNIGA: Your Honor, FCI  
3 Raybrook, in Raybrook, New York, I think that would  
4 be appropriate.

5 THE COURT: Is that R-A-Y-B-R-O-O-K?

6 PROBATION OFFICER ZUNIGA: Yes, Your  
7 Honor.

8 THE COURT: And what is that close to?

9 PROBATION OFFICER ZUNIGA: It's close  
10 to -- it says, "Upstate New York, between the  
11 villages of Lake Placid and Saranac Lake." And  
12 there are some in New Jersey.

13 THE DEFENDANT: Fort Dix would be closer.

14 PROBATION OFFICER ZUNIGA: Fort Dix,  
15 that's in New Jersey, right?

16 THE DEFENDANT: Yes.

17 THE COURT: Do you have -- are all three  
18 of those facilities --

19 PROBATION OFFICER ZUNIGA: Yes, Your  
20 Honor.

21 THE COURT: And do you have a preference  
22 among those three?

23 THE DEFENDANT: Yes. Fort Dix or  
24 Farrington.

25 THE COURT: All right. So do you want me

1 to eliminate the Lake Placid one and just go with  
2 the New Jersey sites? Do you have a preference  
3 between those two?

4 THE DEFENDANT: Fort Dix.

5 THE COURT: All right. You may list both  
6 the New Jersey facilities in the order of one, two.

7 Any objection to that, Mr. Hurtado?

8 MR. HURTADO: No, sir.

9 THE COURT: All right. Any objection --  
10 or let me ask both counsel whether they know of any  
11 reason why the sentence should not be imposed as the  
12 Court has stated it, other than what may have been  
13 argued before. Mr. Hurtado?

14 MR. HURTADO: No, sir.

15 THE COURT: Mr. Baiamonte?

16 MR. BAIAMONTE: No, other than what's been  
17 argued, sir.

18 THE COURT: All right. It is ordered then  
19 that sentence be imposed as the Court has stated it.

20 Mr. McKenzie, you can appeal your  
21 conviction if you believe that things occurred here  
22 unlawfully or involuntarily or if there's some other  
23 fundamental defect in the proceedings that was not  
24 waived.

25 You also have a statutory right to appeal

1 your sentence under certain circumstances,  
2 particularly if you think the sentence is contrary  
3 to law.

4 You have the right to appeal in in forma  
5 pauperis. And what that means is the Clerk of the  
6 Court will prepare and file a Notice of Appeal, upon  
7 your request, if you're unable to pay the cost of an  
8 appeal. With very few exceptions, any Notice of  
9 Appeal must be filed within 14 days of the entry of  
10 judgment.

11 Mr. McKenzie, do you understand your  
12 rights to an appeal?

13 THE DEFENDANT: Yes, I will appeal.

14 Also, if the Court may, under 18 USC,  
15 306(a)(2)(B), and 20 USC, 2255, paragraph 7,  
16 Rule 8(c), I'm requesting or asking the Court, can I  
17 have legal assistance in filing 2255?

18 THE COURT: Well, I'll tell you how that  
19 generally works here in this district is if you want  
20 to request, we have a committee. It's a pro se  
21 committee. And if you want to make a request, send  
22 a letter to the Clerk of the Court. And then they  
23 will send it to the committee and see if anyone  
24 wants to represent you.

25 You probably need to watch the statute of

1 limitations, because you don't want to wait too  
2 long. So you might want to go ahead and file yours  
3 and then make a request there, as well.

4 So I'd do two things if I were you. I'd  
5 send maybe a letter to the Clerk of the Court,  
6 asking that a lawyer be appointed.

7 But I think I'd also go ahead and file  
8 your -- and you've done good work here. And I'll  
9 get it started, because you don't want to miss the  
10 statute of limitations. But file that. And with  
11 it, file a request for an attorney, and then a judge  
12 will rule on that.

13 So that will give you two ways to get it  
14 started. But I don't think I can probably appoint  
15 somebody to a case that hasn't started. So get it  
16 started, and then we'll consider it.

17 THE DEFENDANT: And I have one statement.  
18 Being that I'm a layman on the law, on the 2255 that  
19 I'm going to submit, I want to reflect perjury. I  
20 want to know that I have enough on the record.

21 I mean earlier, I was kind of nervous. I  
22 don't know if there's enough on the record to  
23 warrant your consideration to even answer the  
24 perjury charges. So I want to know, do I have  
25 enough on the record to even make a 2255 claim in

1 dealing with that?

2 THE COURT: You know, I don't have an  
3 opinion on that. I want to keep an open mind on it,  
4 and so I'm not going say yes or no.

5 Probably what will happen is when you  
6 submit it, I'm going to refer this to a magistrate  
7 judge to take a completely fresh look at it. And  
8 I'll ultimately have to be the one that makes the  
9 decision on it.

10 But I'm going to refer this to a  
11 magistrate judge to take a fresh look, and we'll let  
12 him see whether you have enough evidence or not.

13 THE DEFENDANT: Because one of the  
14 questions that I asked during trial and was never  
15 answered was on dealing with the PNR again is that  
16 when the prosecutor -- when we had a bench  
17 conference, I didn't know until I got my  
18 transcripts, he said he didn't want to be  
19 disingenuous to the Court, but that in the system  
20 identifier, that he recognized in the PNR report  
21 that belonged to Gary Chester that the investigator  
22 was speaking of the person who I dealt with who I  
23 got the ticket from.

24 So the question that I had wanted the  
25 prosecutor to answer was, when and how did he find

1 out that that system identifier belonged to Gary  
2 Chester?

3 Because at that time, then you would have  
4 to have asked Agent Hylander, "Who is this informant  
5 that you're speaking of?" And that's where there  
6 was perjury. Because at the time, at the bench,  
7 when said the system identifier, he didn't want to  
8 be disingenuous to the Court, but the series of  
9 numbers on the PNR report reflected who I dealt  
10 with, which was Chester.

11 But like I said, Agent Hylander said that  
12 he enlarged the PNR report to take off the series of  
13 numbers. And the reason why he did that was because  
14 it reflected who the informant was. So my thing  
15 was, why would he take that off and then leave Gary  
16 Chester, the person I dealt with, unredacted?

17 THE COURT: Well, put that in your  
18 petition. And then like I said, I'm going to give  
19 this to a magistrate judge to get a completely fresh  
20 look. And then it will ultimately have to come back  
21 to me to make a final determination.

22 But you'll get a shot to have somebody  
23 that hasn't sat through this and made all these  
24 decisions take a look at it and see whether he or  
25 she thinks that I've done the right thing here. And

1     whatever complaints you have, you can put in the  
2     petition.

3                 THE DEFENDANT:   Also, on Document 150,  
4     Exhibit 1, dealing with the four facts that  
5     originated out of Flagstaff, I never got a copy of  
6     it unredacted, and I never got the unredacted,  
7     sealed document that was submitted.

8                 And also, from my understanding, these  
9     informants are paid.   They are paid over 10 percent.  
10    I never got any discovery showing how the payment  
11    was handled, if they was paid.   And if no one took  
12    the stand, and if Hyland doesn't know who he  
13    received the document from, who was paid, is that  
14    fraud committed by the DEA?

15                THE COURT:   Well, I certainly will limit  
16    it to discovery.   And you know, I may have gotten --  
17    I mean I think I got it right, but you may think I  
18    got it wrong.

19                And you can complain to the magistrate  
20    judge, saying, "I didn't get this, I didn't get  
21    that."   And if he wants to give you discovery or  
22    something, that's something you can request if it's  
23    necessary.   If it's more of an issue, then he can  
24    just look at it.   That's another possibility.   But  
25    those are things you can raise when you file your

1 2255.

2 It will be referred to me, since it's my  
3 case. But to give you a clean set of eyes to look  
4 at it, and me, too, you know, they'll give me a  
5 report. And if they tell me I did something wrong,  
6 which I make mistakes, then we'll look at what the  
7 magistrate says. But you can raise those issues in  
8 your petition.

9 THE DEFENDANT: I respect your opinion. I  
10 respect your opinion.

11 THE COURT: Oh, I know. You've been  
12 respectful to me.

13 THE DEFENDANT: What I hope is that by me  
14 studying the law, is that what I've come to  
15 understand which is the most important thing, is  
16 that if I don't preserve it, after I'm sentenced,  
17 then I can't bring it up later on. That's why I'm  
18 bringing it up.

19 THE COURT: Okay. Well, I want to give  
20 you that opportunity to make sure that you make your  
21 record.

22 Anything further, Mr. McKenzie?

23 THE DEFENDANT: Also, you instructed  
24 Prosecutor Martinez to do a good-faith NCIC check to  
25 see, did Hylander did conduct an NCIC request before



1 he approached me at the Amtrak station?

2 From my understanding, first I called NCIC  
3 in Virginia. They referred me to the Legal  
4 Department in the FBI. And they explained the  
5 procedure which one has to go through in order for  
6 that request. And what it is is we have to put a  
7 request in, and it has to be date and time specific.

8 And what the FBI does is they check. And  
9 if any inquiries originated out of New Mexico, they  
10 would know what time it happened and who checked on  
11 it. And in my discovery, I never received that  
12 before the trial or after the trial. I never  
13 received this kind of stuff.

14 THE COURT: My memory is that he just said  
15 that they determined that there wasn't --

16 THE DEFENDANT: I have the page where you  
17 instructed Prosecutor Martinez to do a good-faith  
18 check, and I never received it.

19 THE COURT: I recall that he said that  
20 they didn't do an NCIC.

21 THE DEFENDANT: He did say that. And he  
22 also said that you informed him to do it. And in  
23 order for him to do it, he would have to either  
24 prove or show good faith that he did do it. So I  
25 want to put that in the record also.

1 THE COURT: Okay.

2 THE DEFENDANT: The PNR report itself, the  
3 PNR report, that was Exhibit No. 3 that the  
4 prosecutor submitted. One thing my attorneys never  
5 asked -- I didn't pose it to -- truthfully, I never  
6 posed it to Mr. Baiamonte to ask, but I did to  
7 Mr. Cooper during trial, because he kept blowing me  
8 off, is that Agent Hylander said that he relied on  
9 the PNR report to come into the train station.

10 And if you look at the PNR report, the  
11 original copy or the copy that I was given, if you  
12 look at the PNR report, the only thing on it says,  
13 "Purchased July 2nd."

14 As I said before, there's no way -- as I  
15 said in my motion, there's no way to indicate, based  
16 on just the PNR, my method of payment. Which was  
17 stated on his DEA-6 Form the day I was arrested and  
18 also on the form that I submitted to the judge.

19 And that's another question I want to pose  
20 to Officer Hylander. How did he determine that  
21 without speaking to anyone at Amtrak? The liaison  
22 wasn't there that day. How did he determine my  
23 method of payment?

24 There's three names on there. There's  
25 Ruby Johnson's name, my name, and also Andrew Lewis.

1 There's no way to tell who paid for it and how they  
2 paid for it. And that's one of the questions I  
3 wanted to pose.

4 And I want an answer, when the time is  
5 appropriate, to how did he determine the method of  
6 payment, and how it was paid for? There's no way he  
7 could have known that, unless he spoke to somebody  
8 at Amtrak.

9 And he's saying, "No, it's in my report."  
10 And I want to ask him if he spoke to anybody who  
11 works for Amtrak to say that they gave him  
12 information about the PNR report.

13 THE COURT: All right. And you know that  
14 it's kind of difficult for the Court to deal with  
15 ineffective assistance in your case. So the 2255 is  
16 the place where you generally raise the ineffective  
17 assistance.

18 All right, Mr. McKenzie. We've been  
19 together a long time. Good luck to you, and I wish  
20 you well.

21 All right, we'll be in recess.

22 (Court in recess at 10:24 a.m.)

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## REPORTER'S CERTIFICATE

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I, Paul Baca, Official Court Reporter for the US District Court, District of New Mexico, do hereby certify that I reported the foregoing proceedings in stenographic shorthand and that the foregoing pages are a true and correct transcript of those proceedings and was reduced to printed form under my direct supervision.

I FURTHER CERTIFY that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Date: September 14, 2012

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PAUL BACA  
NM Certified Court Reporter #112  
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